U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 February 2004

BALCA Case No.: 2002-INA-262
ETA Case No.: P2001-NJ-02471421

In the Matter of:

LUZ A. MORABE-NAVAL, M.D., PA,
Employer,

on behalf of

NORA C. AGUSTIN,
Alien.

Appearances: Steven Elias, Esquire
New York, New York
For Employer and Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by Dr. Luz A. Morabe-Naval ("Employer") on behalf of Nora C. Agustin ("the Alien") for the position of Domestic Cook. (AF 14-15).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File ("AF"). 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On September 7, 1999, Employer filed an application for alien employment certification on behalf of the Alien for the position of Domestic Cook. The job duties included cooking Filipino dishes, serving lunch and dinner, shopping for food and cleaning the kitchen. (AF 15). Minimum requirements for the position were listed as two years experience in the job offered. Employer received no applicant referrals in response to its recruitment efforts. (AF 27).

A Notice of Findings ("NOF") was issued by the CO on March 6, 2002, proposing to deny labor certification on several grounds. (AF 30-33). The CO questioned the existence of a bona fide job opportunity, questioned Employer's ability to pay the salary offered and found Employer's requirement of two years experience in Filipino Style cooking unduly restrictive. Employer was instructed to submit responses and documentation to six enumerated questions and to document business necessity for its experience requirement. (AF 30-32).

In Rebuttal, Employer submitted documentation of its need for and ability to pay a full-time cook. Employer further stated as justification for its experience requirement that Dr. Naval's appointment as the Honorary Cultural and Healthcare Spokesperson for the Philippine Embassy entailed commitments where "the guests invited to the events have an expectation that all meals and all courses of the meals will be authentically Filipino and prepared in the Filipino-style." (AF 42). Employer included a copy of a letter from a doctor, confirming that Employer was on a low sodium diet due to hypertension. (AF 50). Also included were copies of menus, the schedules of those in Employer's household, Employer's entertainment schedule and a copy of Employer's federal income tax return for 1999. (AF 32-55).

On May 18, 2002, the CO issued a Final Determination ("FD") denying labor certification based upon a finding that Employer had failed to adequately document business necessity for its requirement of two years Filipino style cooking experience.

The CO found that Employer had adequately rebutted the bona fide job opportunity and ability to pay issues. (AF 56-57).

Employer filed a Request for Review by letter dated June 19, 2002 and the matter was docketed in this Office on September 4, 2002. (AF 58-59).

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) requires an employer to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the *Dictionary of Occupational Titles* (D.O.T.). Although "cooking specializations are sometimes part of the job," cooking specialization requirements for domestic cooks are unduly restrictive job requirements within the meaning of the regulation at 20 C.F.R. § 656.21(b)(2). *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*). Therefore these requirements must be justified by business necessity under the test found in *Information Industries, Inc.,* 1988-INA-82 (Feb. 9, 1989) (*en banc*). Pursuant to the Board's holding in *Information Industries,* in order to establish business necessity, an employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described.

The CO in this case identified three specific points for Employer to address with respect to documenting business necessity for its restrictive cooking specialization requirement. The CO directed Employer to show why a cook without prior Filipino style cooking experience was not capable of preparing Filipino style food, why Employer or a family member could not provide training, and whether the job, as described, existed before the Alien was hired or there was a major change in the household operation which caused the job to be created after the Alien was hired. (AF 30-31).

In rebuttal, Employer documented the medical need for a low sodium diet and provided menus that included Filipino style cooking. Employer also provided an entertainment schedule for hosting gatherings once or twice a month where Employer stated it is expected that Filipino style food be served. Employer further claimed there are no known recipes for most Filipino dishes but rather a tradition of handing down recipes through the generations and by word of mouth. Hence, Employer maintained that a candidate with no prior experience could not have any prior knowledge of the recipes or the ability to substitute ingredients for those unavailable in the United States while still maintaining the essential taste and nature of Filipino foods. Employer stated that they could not provide training as their experience with the different regional foods of the Philippines is very limited. (AF 38-39).

In affirming the denial of certification, we note that Congress enacted § 212(a)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5) of the Immigration Act of 1990 and recodified at 8 U.S.C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." *Cheung v. District Director, INS,* 641 F.2d 666, 669 (9th Cir., 1981); *Wang v. INS,* 602 F.2d 211, 213 (9th Cir. 1979).[3] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Consequently, the burden of proof in the labor certification process is on the employer. *Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996); 20 C.F.R. § 656.2(b).

In the instant case, Employer's rebuttal seemed to suggest that only persons of Filipino descent, with generations of "word of mouth" recipes, would be capable of preparing this cuisine. A search on the internet, in a library or bookstore proves to the contrary that there are many Filipino recipes in print. Employer's rebuttal, that Filipino

[3] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. *See* S. Rep No. 748, 89th Cong., lst Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 3333-3334.

cuisine requires detailed knowledge, implies but does not prove that an otherwise experienced domestic cook could not adapt to cook that type of cuisine within a reasonable period after taking the job. *Kaplan, supra.*

On this basis, we conclude that Employer has not adequately documented business necessity for its unduly restrictive two years Filipino style cooking requirement. Accordingly, it is determined that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten

pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.